

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of)
AIRCOM CONSULTANTS, INC.) File Nos. 0005042963-0005042967
Requests for Extension of Time, or in the)
alternative, Limited Waiver of Substantial Service)
Requirements for Five Local Multipoint)
Distribution Service Licenses)

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2012

Released: November 16, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny Aircom Consultants, Inc.’s (“Aircom”) requests for extension of time to demonstrate compliance with the substantial service requirements for its five Local Multipoint Distribution Service (“LMDS”) licenses, as well as its associated requests for waiver of the June 1, 2012 substantial service deadline. Given our denial of these requests, these licenses automatically terminated, by operation of Commission rule, as of June 1, 2012.

II. BACKGROUND

2. In 1997, the Commission allocated 1,300 megahertz of LMDS spectrum in each basic trading area (“BTA”) across the United States.1 Specifically, the Commission allocated two LMDS licenses per BTA – an “A Block” and a “B Block” license in each.2 The A Block license is comprised of 1,150 megahertz of total bandwidth, and the B Block license is comprised of 150 megahertz of total

1 See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12605 ¶ 136 (1997) (“Second LMDS Report and Order”); see also Rand McNally Commercial Atlas & Marketing Guide 36-39 (123rd ed. 1992). Rand McNally is the copyright owner of the Major Trading Area (MTA) and BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally’s Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally’s Commercial Atlas & Marketing Guide. The conditional use of Rand McNally copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994 and covers use by LMDS applicants. This agreement requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally ownership. The Commission has allocated the LMDS for operations in a total of 493 BTAs throughout the nation.

2 See Second LMDS Report and Order, 12 FCC Rcd at 12556 ¶ 12.

bandwidth.³ The A Block consists of the sub bands 27.50-28.35 GHz (the A1 Band); 29.10-29.25 GHz (the A2 Band); and 31.075-31.225 GHz (the A3 Band).⁴ The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).⁵ The same entity may hold the licenses for both the A and B Blocks of spectrum in an individual BTA, but each license is auctioned and licensed separately.

3. LMDS licensees are regulated under Part 101 of the Commission's rules, which generally governs terrestrial microwave operations, and may provide any service consistent with the Commission's Rules and the licensee's regulatory status,⁶ subject to a ten-year term from the initial license grant date.⁷ At the end of the ten-year period, licensees are required to submit an acceptable showing to the Commission demonstrating that they are providing "substantial service" in each licensed area.⁸ Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.⁹

4. The final LMDS band allocation was adopted by the Commission on March 20, 1997.¹⁰ Since allocating the LMDS spectrum, the Commission has thus far held two LMDS auctions: Auction 17 and Auction 23.¹¹ Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998.¹² The licenses in question here were originally issued to AirCom Consultants, Inc., d/b/a InAirNet on June 5, 1998 as a result of Auction No. 17.¹³ After some intermediate name changes, on June 15, 2011, the name of the licensee was changed to Aircom Consultants, Inc..¹⁴

³ See *id.*

⁴ See 47 C.F.R. § 101.1005.

⁵ See *id.*

⁶ See 47 C.F.R. § 101.1013(b).

⁷ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259. Pursuant to 47 C.F.R. § 101.67, LMDS licenses are issued for a period not to exceed ten years, subject to renewal upon demonstration of substantial service.

⁸ See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

⁹ See 47 C.F.R. § 101.1011(a).

¹⁰ See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 13; see also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19025 ¶ 45 (1996) (allocating the initial 1 gigahertz of spectrum for LMDS and seeking comment on the allocation of an additional 300 megahertz of spectrum at 31.0-31.3 GHz).

¹¹ See, e.g., LMDS Auction Closes, *Public Notice*, 13 FCC Rcd 18217 (1998) (*Auction 17 Closing PN*); Local Multipoint Distribution Service Auction Closes, *Public Notice*, 14 FCC Rcd 8543 (1999) (*Auction 23 Closing PN*).

¹² See FCC Announces Spectrum Auction Schedule for 1998, *Public Notice*, 12 FCC Rcd 19726 (1997); *Auction 17 Closing PN*, 13 FCC Rcd at 18217.

¹³ See File No. 0000000128 (granted June 5, 1998); see also FCC Announces the Conditional Grant of Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 16518 (WTB 1998). The licenses in question are Stations WPLM235 (Clovis, NM), WPLM236 (Prescott, AZ), WPLM237 (Yuma, AZ), WPLM238 (Roseburg, OR), and WPLM239 (Longview, WA).

¹⁴ See File Nos. 0004764479-0004764483 (filed June 14, 2011, granted June 15, 2011).

5. Aircom was originally required to demonstrate substantial service by June 5, 2008, or 10 years after the initial license grant date.¹⁵ On June 25, 2007, Aircom filed applications for an extension of time to demonstrate substantial service for its LMDS licenses.¹⁶ On April 11, 2008, the Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including Aircom – to extend their deadlines to meet the substantial service requirements to June 1, 2012, resulting in a nearly four-year construction extension for each of these licensees.¹⁷ The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.¹⁸ In making this finding, the Bureau noted that the licensees seeking relief from the construction deadlines represented a majority of LMDS licensees for whom buildout requirements were approaching, and that they all faced these same basic obstacles to timely construction.¹⁹ Thus, these obstacles were not a product of an individual licensee’s short-sightedness or its unfortunate business decisions; rather, the difficulties in procuring the basic equipment necessary for LMDS operations were widespread, stemming from the state of the market. Based on the record evidence, the Bureau anticipated that various developments in the market – arising in large part from the rollout of new services that could provide opportunities for LMDS operations – would help rectify these difficulties. Thus, the Bureau found that Aircom and others could potentially use their LMDS licenses to provide wireless backhaul services to licensees in the 700 MHz band, the Advanced Wireless Services-1 (“AWS-1”) band, and other bands suitable for mobile broadband service, all of which at that time had recently been auctioned, licensed, or put into use.²⁰ The Bureau anticipated that these bands would develop robustly, along with other mobile and fixed wireless services, and that resulting opportunities for associated LMDS service (such as wireless backhaul) would help spur production of equipment designed for LMDS use and thus facilitate timely construction by Aircom and the other LMDS licensees, under the extended buildout deadline set by the Bureau.²¹

6. On January 23, 2012, Aircom filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking a further five year extension of time until December 1, 2013, to construct its five LMDS licenses.²² Aircom later revised its request to seek an extension of at least two years.²³ Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, Aircom alternatively seeks a waiver of Section 101.1011(a) of the Commission’s Rules, as a means of extending the construction deadline applicable to the licenses until at least June 1, 2014.²⁴ Aircom reports

¹⁵ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259.

¹⁶ File Nos. 0003085307-0003085311 (filed June 25, 2007).

¹⁷ Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission’s Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd 5894 (WTB 2008) (*LMDS Order*).

¹⁸ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

¹⁹ *Id.*

²⁰ *Id.* at 5905 ¶ 25.

²¹ *Id.*

²² See File Nos. 0005042963-0005042967 (filed Jan. 23, 2012) (Extension Applications). With each Extension Application, Aircom filed an exhibit entitled “Construction Deadline Extension Request-Waiver.”

²³ Aircom twice amended its Extension Applications to provide a revised exhibit. The most recent exhibit was filed on August 7, 2012 and is entitled “Revised Waiver Request for Construction Deadline Extension” (Extension and Waiver Request). This *Memorandum Opinion and Order* will focus on the most recent exhibit filed by Aircom.

²⁴ Extension and Waiver Request at 1.

that it launched service in the Yuma market but the service failed.²⁵ Aircom is attempting to deploy a rural health care broadband network for telemedicine, medical distance learning, and electronic medical record information technology infrastructure into rural communities and tribal lands within its service areas.²⁶ Although Aircom has spoken to a variety of vendors, it has been unable to find equipment that complies with the Office of the National Coordinator for Health Information Technology's requirements for secure transmission of medical information.²⁷ Compliance with such requirements is necessary to comply with the privacy provisions of the Health Insurance Portability and Accountability Act (HIPPA).²⁸ Aircom has also investigated cloud providers but has been unable to find a provider that could meet HIPPA requirements.²⁹ Aircom has met with a variety of tribal councils, medical institutions, universities, communications providers, and state and federal officials in attempting to create a medical team of professionals to provide remote diagnostics, medical training, and medical imaging.³⁰ Aircom also details various expenses it has incurred and attempts it has made to obtain funding to support its proposed business plan.³¹ Aircom asks for more time to develop a "specialized and technologically sophisticated broadband telehealth infrastructure . . ."³²

III. DISCUSSION

7. We find that Aircom has not justified a grant of an extension of time, or a waiver of the construction deadline, for its LMDS licenses. And without such extension or waiver, Aircom's LMDS licenses have automatically cancelled, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.³³ We discuss these findings in detail below.

A. Extension Requests

8. Aircom requests a further two year extension of time, until June 1, 2014, to demonstrate substantial service.³⁴ As noted above, this is the second extension that Aircom has requested for constructing these licenses. To be eligible for an extension of time to construct, Aircom must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."³⁵ We conclude that Aircom has not met this threshold.

²⁵ *Id.* at 2.

²⁶ *Id.* at 1-2.

²⁷ *Id.* at 1.

²⁸ *Id.* at 2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 47 C.F.R. §§ 1.946(c) (providing that if a licensee in the Wireless Radio Services fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires) and 1.955(a)(2) (cross-referencing Section 1.946(c) and reiterating that authorizations in the Wireless Radio Services automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements).

³⁴ Extension and Waiver Request at 1.

³⁵ 47 C.F.R. § 1.946(e)(1).

9. Aircom argues that it has not constructed because it has been unable to find LMDS equipment that will support its proposed rural broadband telehealth network while complying with the necessary requirements for securing transmitting health information. The Commission has consistently found that a licensee's own business decisions are not circumstances beyond the licensee's control and are therefore not an appropriate basis for regulatory relief.³⁶ In view of this precedent, we find that none of the factors cited by Aircom demonstrate that its failure to construct was caused by circumstances beyond its control.

10. We find that Aircom voluntarily chose to pursue a business model based on rural health care that was dependent on obtaining equipment that could meet the relevant privacy standards. It thus assumed the risk that such equipment could not be developed. While Aircom has apparently made serious efforts to obtain such equipment, it has not made any progress in obtaining equipment that would meet its specific business plan. Many LMDS licensees did meet the June 1, 2012 deadline and built facilities.³⁷ Under those circumstances, we conclude that Aircom's failure to meet the June 1, 2012 deadline was a result of its voluntary decision to pursue a specific business plan that it was not able to implement in a timely fashion.

B. Waiver Request

11. To be granted a waiver of the June 1, 2012 construction deadline, Aircom must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁸ As is discussed more fully below, we conclude that Aircom has failed to make the requisite showing, and we therefore deny its waiver request.

12. First, we conclude that an extension would be inconsistent with the underlying purpose of the substantial service standard, which, as the Commission has said, is to provide "a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public."³⁹ Many

³⁶ See, e.g., Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercises of business judgment and were not outside Petitioner's control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee's determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties was within licensee's control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee's control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff'd sub nom.*, *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

³⁷ As of October 3, 2012, the Broadband Division had accepted 67 LMDS buildout notifications from at least 18 different licensees. Another 221 showings were pending and undergoing review.

³⁸ See 47 C.F.R. § 1.925(b)(3); see also 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972).

³⁹ See Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees, WT Docket No. 10-153, *Second Report and Order, Second Further Notice of Proposed* (continued...)

other licensees were able to build their facilities. Granting Aircom a further extension despite its lack of progress in developing its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

13. We also conclude that Aircom has not shown requiring compliance with the substantial service rules is inequitable, unduly burdensome, and contrary to the public interest. As we have previously discussed, Aircom's inability to construct its LMDS licenses was a product of its business decision. Other licensees made other business decisions that led them to build out their licenses.⁴⁰

14. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴¹ In light of our decision to deny Aircom's request for an extension or waiver of the construction requirements on the ground that grant of such request is not in the public interest, Aircom's licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,⁴² as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

15. Aircom has failed to justify an extension of time to meet the substantial service deadline for its LMDS stations or to justify a waiver of the June 1, 2012 deadline for establishing substantial service. We therefore deny the Extension and Waiver Request. Accordingly, Aircom's licenses to operate LMDS stations have automatically terminated, by operation of Commission rule, as of June 1, 2012.

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the request for waivers and the applications for extension of time to demonstrate substantial service (File Nos. 0005042963-0005042967) filed by Aircom Consultants, Inc. on January 23, 2012, as amended, ARE DENIED.

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Rulemaking, Second Notice of Inquiry, Order on Reconsideration, and Memorandum Opinion and Order, 27 FCC Rcd 9735, 9773-9774 ¶ 104 (2012), citing Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18623 ¶ 42 (1997) (“39 GHz R&O”); see also *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 46 (“This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public.”); *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 46 (“This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.”); *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 47 (“[A]pplying a similar performance requirement to all licensees at the license renewal point will help establish a level playing field without compromising the goals of ensuring efficient spectrum use and expeditious provision of service to the public.”); *Renewal of Licenses to Provide Microwave Service in the 38.6 – 40.0 GHz Band, Memorandum Opinion and Order*, 17 FCC Rcd 4404, 4407 ¶ 11 (WTB PS&PWD 2002) (“The Commission's overarching purpose behind adopting the substantial service standard for renewal was to ensure that the spectrum was being used to provide service to the public.”).

⁴⁰ See note 3736, *supra*.

⁴¹ 47 C.F.R. §§ 1.946(c) and 1.955(a)(2).

⁴² *Id.*

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the Universal Licensing System SHALL BE UPDATED to reflect that the licenses issued to Aircom Consultants, Inc. for Local Multipoint Distribution Service Stations WPLM235, WPLM236, WPLM237, WPLM238, and WPLM239 TERMINATED as of June 1, 2012.

18. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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